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In the Supreme Court of the United States

JAMES M. MCGOWAN, SR., PETITIONER

v.

NJR SERVICE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

A pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, requires a married participant to decide, before retirement, whether to receive benefits in the form of a qualified joint and survivor annuity (QJSA). Petitioner selected that option, retired, and began receiving benefits. The question presented is whether a federal common law rule should be fashioned that requires the plan administrator to recognize a post-retirement waiver by petitioner's former spouse of her right to the survivor annuity.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, as amended, governs the payment of benefits pursuant to employee benefit plans. Among other things, it requires certain pension plans, primarily defined benefit pension plans, to provide for the payment of benefits in the form of a qualified joint and survivor annuity (QJSA). 29 U.S.C. 1055(a)(1); see *Boggs* v. *Boggs*, 520 U.S. 833, 842 (1997). Under a QJSA, a vested participant receives an annuity for his or her lifetime, and the participant's spouse, if he or she survives the participant, receives a survivor's annuity that may not be less than 50% of

the annuity payable during the joint lives of the participant and spouse. 29 U.S.C. 1055(d)(1).

A participant may elect to waive the QJSA form of benefits, with the written consent of the spouse, "during the applicable election period." 29 U.S.C. 1055(c)(1)(A)(i). A participant may also revoke any such election during the applicable election period. 29 U.S.C. 1055(c)(1)(A)(ii). The applicable election period for a QJSA is generally "the 90-day period ending on the annuity starting date" (*i.e.*, the date as of which annuity payments begin to be made). 29 U.S.C. 1055(c)(7)(A). A plan is required to notify a participant of the election right within a "reasonable period of time" and in a manner consistent with regulations of the Secretary of the Treasury. 29 U.S.C. 1055(c)(3)(A). Those regulations generally require that the written explanation be given no less than 30 days and no more than 90 days before the annuity starting date. 26 C.F.R. 1.417(e)-1(b)(3)(ii).[1]

More generally, ERISA requires each pension plan to "provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). One exception to that anti-alienation rule applies to a state domestic relations order that is determined by the plan to be a qualified domestic relations order (QDRO) under standards set forth in ERISA. 29 U.S.C. 1056(d)(3).[2] A QDRO may assign a right to any benefit payable with respect to a participant, but may not "require a plan to provide any type or form of benefit, or any option, not otherwise provided under the

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[1] The Pension Protection Act of 2006, Pub. L. No. 109-280, § 1102(a), 120 Stat. 1056, extends the 90-day period to 180 days. Because this provision is effective for years beginning after December 2006, it does not apply to this case.

[2] A QDRO is also excepted from the operation of ERISA's preemption provision. See 29 U.S.C. 1144(b)(7).

plan," or "require the plan to provide increased benefits (determined on the basis of actuarial value)." 29 U.S.C. 1056(d)(3)(A), (D)(i) and (ii). If the order qualifies as a QDRO, the pension plan must provide for the payment of benefits in accordance with the QDRO's requirements. 29 U.S.C. 1056(d)(3)(A).

Under ERISA, persons who manage an employee benefit plan or have any discretionary authority or responsibility in the administration of the plan are fiduciaries. 29 U.S.C. 1002(21)(A)(i) and (iii). A fiduciary must discharge his or her duties with respect to a plan solely in the interest of participants and beneficiaries and, among other things, "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]." 29 U.S.C. 1104(a)(1)(D).

2. Respondent New Jersey Natural Gas Company has a pension plan that, consistent with the statutory and regulatory requirements, allows a participant to waive, with spousal consent, the QJSA form of benefits available to married plan participants. Pet. App. 49a. The plan provides that the period during which a participant may elect to waive the QJSA begins on the date the plan is required to give the participant notice of his right to make that election "*and ends on the date his benefits are to commence.*" *Id.* at 50a (citation omitted).

Petitioner is a former employee of New Jersey Natural Gas Company. Pet. App. 3a, 42a. While still employed with the company, he married Rosemary Byrne, and in August 1996, he designated her as his beneficiary under the company's pension plan. *Id.* at 42a. In October 1996, petitioner elected to receive his benefits in a joint and survivor annuity, with a 50% survivor annuity payable to Byrne in the event of his death. *Ibid.* In November 1996, petitioner re-

tired and began to receive benefits under the plan. *Id.* at 3a, 42a.

In July 1998, petitioner and Byrne entered into a Marital Settlement Agreement under which she purported to "waive[] any and all rights, title, interest or claims . . . to all bank accounts, life insurance policies and any right to the New Jersey Gas Company Employee Pension Plan of the Husband." Pet. App. 3a, 43a (citations omitted).[3] That agreement was incorporated into a final judgment of divorce in May 1999. *Id.* at 3a, 42a-43a. The parties agree that the agreement did not qualify as a QDRO. Pet. App. 10a n.3, 49a n.5.

In November 2001, five years after he retired, petitioner married Donna McGowan, his current spouse. Pet. App. 3a, 43a. Soon thereafter, petitioner sought to name Donna McGowan as his spousal beneficiary for purposes of his joint and survivor annuity. *Ibid.* Respondent NJR Service Corporation, the plan administrator, denied the request. *Id.* at 3a-4a, 43a. After exhausting plan remedies, petitioner filed an action in district court, seeking an order directing the plan administrator to designate Donna McGowan as the spouse entitled to the survivor's annuity. *Id.* at 43a-44a; see 29 U.S.C. 1132(a)(1)(B) (participant may file a civil action "to enforce his rights under the terms of

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[3] In July 1998, Byrne consented in writing to petitioner's election of Shirley McGowan, petitioner's first wife, as the spouse who would receive a survivor's annuity under the plan. Pet. App. 3a, 43a. In August 1998, respondent NJR Service Corporation, the plan administrator, denied petitioner's request to record Shirley McGowan as the spousal beneficary for that purpose. *Id.* at 3a. Petitioner does not challenge that denial. See Pet. 3.

the plan, or to clarify his rights to future benefits under the terms of the plan").[4]

3. The district court granted summary judgment to respondents. Pet. App. 41a-55a. The court framed the issue as "whether an ERISA pension benefit plan participant receiving benefits, whose plan does not permit a change of beneficiaries once benefits have commenced, may change the designated beneficiary in his plan from the participant's ex-wife to his current wife without a valid Qualified Domestic Relations Order ('QDRO')." *Id.* at 45a; see 29 U.S.C. 1056(d)(3) (discussing requirements for a QDRO, which, as an exception to the general rule in 29 U.S.C. 1056(d)(1) "that benefits provided under the [pension] plan may not be assigned or alienated," is a mechanism for redirecting benefits to an alternate payee named in a domestic relations order obtained in a divorce). To answer that question, the district court considered, as a "threshold question," whether a beneficiary of an ERISA plan can waive her rights to benefits under the plan. Pet. App. 46a. The court reasoned that, "[a]bsent an initial finding that Rosemary [Byrne] waived her contingent beneficiary rights in [petitioner's] pension plan, the Court cannot determine whether [petitioner] is entitled to nominate Donna [McGowan] as his beneficiary." *Id.* at 46a n.1.

The district court concluded that a clear beneficiary designation pursuant to an ERISA plan cannot be set aside by a waiver in external documents absent "specific circumstances" such as a QDRO. Pet. App. 49a & n.5. The district court reasoned that that result comports with congressional intent to provide for simple and uniform plan administra-

[4] Petitioner also sought civil penalties under 29 U.S.C. 1132(c) for respondents' failure to provide plan documents. Pet. App. 44a. The court of appeals affirmed the district court's denial of relief, *id.* at 17a-18a, and petitioner does not seek review on that issue. Pet. 4.

tion, and with ERISA's requirement that plan administrators discharge their obligations "in accordance with the documents and instruments governing the plan." *Id.* at 49a (quoting 29 U.S.C. 1104(a)(1)(D)). The district court accordingly rejected a rule recognized by a majority of courts of appeals, which gives effect to waivers in non-plan documents as a matter of federal common law. *Id.* at 46a-47a (discussing majority rule).

The district court also concluded that the plan terms in this case prohibit changing a beneficiary once benefit payments have commenced. Pet. App. 49a-51a. Accordingly, the court ruled that Byrne could not waive her rights as a beneficiary so as to permit petitioner to change the designated beneficiary to his current wife.

4. A divided court of appeals affirmed the district court's grant of summary judgment. Pet. App. 1a-40a. The majority reasoned that permitting a beneficiary like Byrne to waive her rights to a surviving spouse's annuity in favor of another spouse without complying with the QDRO provisions would contravene ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1). Pet. App. 13a-17a (Van Antwerpen, J.); *id.* at 19a-26a (Becker, J., concurring).[5] Having concluded that Byrne could not waive her rights as a surviving spouse, the majority did not discuss whether petitioner

[5] Judge Antwerpen agreed with the district court that permitting a waiver in the circumstances presented would be contrary to congressional intent to provide for simple and uniform plan administration and contrary to the requirement in 29 U.S.C. 1104(a)(1)(D) that plan administrators discharge their fiduciary obligations in accordance with governing plan documents. Pet. App. 8a-13a. Judge Becker and dissenting Judge Fuentes rejected those grounds for declining to recognize a waiver. *Id.* at 26a-29a (Becker, J., concurring); *id.* at 37a (Fuentes, J., dissenting).

could have designated his current wife, Donna McGowan, as the surviving spouse.

Judge Fuentes dissented. Pet. App. 30a-40a. He reasoned that the anti-alienation clause does not address waivers, which he regarded as distinct from alienations and assignments. *Id.* at 30a-38a. Judge Fuentes accordingly concluded that ERISA is "silen[t]" with respect to the validity of Byrne's waiver, *id.* at 37a, and that "federal common law should fill the gap" (*id.* at 38a) by "giv[ing] effect to [Byrne's] waiver," *id.* at 40a. Judge Fuentes would have remanded, however, for the district court to consider the further question whether petitioner's designation of Donna McGowan, in light of Byrne's waiver, was valid, noting "good reasons not to honor [the designation]." *Id.* at 35a n.16.

DISCUSSION

The court of appeals correctly held that ERISA entitled respondents not to recognize Rosemary Byrne's purported waiver of her right, under the QJSA provisions of ERISA, to a surviving-spouse annuity as part of a post-retirement arrangement with petitioner to allow him to designate his current spouse to receive that annuity. ERISA has special rules for QJSAs, and no court of appeals has required a plan administrator to recognize a waiver in the QJSA context presented here, where a participant seeks to change the designated surviving spouse in a QJSA after the participant has retired and started to receive annuity payments.

Moreover, while the three-way division of the judges on the panel mirrors a broader conflict that exists in the courts of appeals and the state courts on the question whether a purported waiver by an ERISA beneficiary must be given binding effect as a matter of federal common law, there are substantial reasons to believe that courts that have held

that waivers must be given effect as a matter of federal common law in other circumstances would not do so in the post-retirement, QJSA context presented here. That question, which has arisen outside the QJSA context in various cases, is important to plan administrators and individuals claiming plan benefits. This case, however, arises in an unusual factual context that implicates special rules on which there is no conflict, and thus is not an appropriate case for resolving the broader question of common law waivers that has divided the courts. Accordingly, the petition for a writ of certiorari should be denied.

A. The Court of Appeals' Decision Is Consistent With This Court's Precedents

1. This Court has twice spoken to the preemptive effect of ERISA on state law in the context of deciding spousal rights to a pension under a covered plan. In *Boggs* v. *Boggs*, 520 U.S. 833, 835-836 (1997), the Court held that ERISA preempted state community property law to the extent state law allowed a spouse to make a testamentary transfer of her interest in undistributed pension plan benefits to her sons. The Court reasoned that the state law affirmatively conflicted with ERISA's QJSA provisions by giving rights to a surviving spouse's annuity to persons other than the surviving spouse. *Id.* at 841-844. The Court further reasoned that the specified methods of transfer set forth in the QJSA provisions in 29 U.S.C. 1055, and the QDRO provisions in 29 U.S.C. 1056(d), "give rise to the strong implication that other community property claims are not consistent with the statutory scheme." 520 U.S. at 847.

In *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 143 (2001), the Court held that ERISA preempted a state law that treated a participant's divorce as automatically revoking his desig-

nation of his former spouse as the beneficiary under a life insurance policy and a pension plan. The Court reasoned that the state law

> runs counter to ERISA's commands that a plan shall 'specify the basis on which payments are made to and from the plan,' [29 U.S.C.] § 1102(b)(4), and that the fiduciary shall administer the plan 'in accordance with the documents and instruments governing the plan,' [29 U.S.C.] § 1104(a)(1)(D), making payments to a 'beneficiary' who is 'designated by a participant, or by the terms of [the] plan.' [29 U.S.C.] § 1002(8).

Id. at 147. The state law was in conflict, the Court explained, because under that law, "the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow." *Id.* at 151 n.4. The Court further reasoned that the state law interfered with ERISA's goal of enabling employers to establish a uniform scheme of plan administration. *Id.* at 148-149.[6]

2. *Boggs* and *Egelhoff* support the court of appeals' conclusion that the pension plan administrator in this case was not required, as a matter of federal common law, to recognize Byrne's waiver of her rights under petitioner's pension plan as part of an arrangement to enable petitioner ultimately to substitute his current wife as the person entitled to a survivor annuity. The waiver is set out in a property settlement that was incorporated into a state-court divorce decree. Pet. App. 3a, 43a. The parties agreed, however,

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[6] The Court recognized a possible argument that ERISA would not preempt a state "slayer" statute that revoked the beneficiary status of someone who murdered a plan participant. *Egelhoff*, 532 U.S. at 152. The Court did not decide the question, but noted that the principle underlying "slayer" statutes "is well established in the law and has a long historical pedigree predating ERISA." *Ibid.*

that the decree did not qualify as a QDRO. *Id.* at 10a n.3, 49a n.5. Under these circumstances, when the statute provides a specific mechanism for addressing the elimination of a spouse's contingent interest in a QJSA, but that mechanism was not invoked, there is no basis for courts to formulate a supplementary rule as a matter of federal common law.

Moreover, a federal common law rule requiring the plan to recognize the waiver in this situation would affirmatively conflict with ERISA by purporting to determine rights to a survivor's annuity in a manner not authorized by the QJSA provisions in 29 U.S.C. 1055 (2000 & Supp. III 2003) or the QDRO provisions in 29 U.S.C. 1056(d)(3).

For example, Section 1055(c)(1)(A)(i) provides that a waiver of the QJSA must occur "during the applicable election period," which is "the 90-day period ending on the annuity starting date," 29 U.S.C. 1055(c)(7)(a). Section 1055(c)(2)(A)(i) provides that such a waiver must be accompanied by the designation of another beneficiary, unless the surviving spouse's consent to the waiver "expressly permits designations * * * without any requirement of further consent." Here, Byrne's purported waiver (or, in the terms of the statute, her consent to petitioner's waiver) of her QJSA benefit occurred more than a year and a half after the election period was over, and petitioner then did not designate Donna McGowan until several years after Byrne's waiver. See Pet. App. 42a-43a.[7] In addition, by

[7] Section 1055 does not, by its terms, preclude a plan from providing for a new annuity starting date to permit the survivor beneficiary under a QJSA form of benefit to be changed after the original annuity starting date, provided that the plan's procedures for changing the beneficiary otherwise comply with the spousal consent requirements of Section 1055 and that the consent of the person who was the participant's spouse on the original annuity starting date is obtained. Because the

seeking to change the surviving spouse for the annuity after the annuity starting date, the waiver also conflicts with 29 U.S.C. 1056(d)(3)(D)(i), which states that a domestic relations order, in order to qualify as a QDRO, cannot require a plan to provide a "type or form of benefit" or an "option" not otherwise provided by the plan. See note 15, *infra*.

As the Court noted in *Boggs*, the QJSA provisions in 29 U.S.C. 1055 and the QDRO provisions in 29 U.S.C. 1056 "give rise to the strong implication" that allowing other bases for claiming rights to a pension "are not consistent with the statutory scheme." *Boggs*, 520 U.S. at 847. And, as was the case in *Egelhoff*, the requirement in 29 U.S.C. 1104(a)(1)(D) that fiduciaries administer the plan according to its terms does not permit recognition of the waiver and redesignation here, which occurred after the plan's applicable election period closed and after the payment of retirement benefits according to the plan's terms commenced. See Pet. App. 42a-43a, 50a.

3. This Court has recognized circumstances in which it is appropriate for courts to develop federal common law under ERISA. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987). The circumstances of this case, however, are not appropriate for fashioning federal common law. The question here does not implicate a gap in the statutory scheme, but a subject ERISA squarely addresses. Because requiring respondents to recognize the waiver in this case would conflict with specific ERISA provisions governing these very circumstances, a requirement that the waiver be given binding effect cannot be justified

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plan in this case does not allow for a new annuity starting date, and because Byrne's waiver did not comply with the requirements of Section 1055, this case does not present the question whether anything in ERISA would preclude a plan from offering such an option.

as a matter of federal common law. "The authority of courts to develop a 'federal common law' under ERISA * * * is not the authority to revise the text of the statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted). Invoking federal common law to require respondents to recognize a waiver would revise the text of ERISA by creating a waiver exception to the rules in 29 U.S.C. 1055 (2000 & Supp. III 2003), 29 U.S.C. 1056(d), and 29 U.S.C. 1104(a)(1)(D), concerning who is entitled to benefits under a pension plan.[8]

Moreover, to apply such a rule as a matter of federal common law would be contrary to this Court's refusal to develop common law principles when ERISA itself gives authority to an agency to address the issue and the agency does not support the common law rule. See *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 831-832, 834 (2003)

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[8] The court of appeals concluded that recognizing a waiver in this case, where the parties agreed there was no QDRO, would also conflict with the prohibition in 29 U.S.C. 1056(d)(1) against the assignment or alienation of pension benefits. Pet. App. 13a-17a; see note 15, *infra* (discussing the application of ERISA's QDRO provisions in the post-retirement context). Because respondents were not required to recognize the waiver for the independent reasons discussed in the text, there would be no reason for this Court to reach that question in this case.

If there *were* a valid QDRO, the anti-alienation provision would be inapplicable because 29 U.S.C. 1056(d)(3) expressly exempts a QDRO from that provision. Conversely, where, as here, there is *not* a valid QDRO, there is, as explained in the text, no basis for the courts to fashion a waiver rule as a matter of federal common law, whether or not ERISA's anti-alienation provision would also bar the courts from doing so. The anti-alienation provision therefore is of little independent significance in determining whether courts may require a plan to accept a waiver as part of an arrangement to enable the participant to designate his new spouse as the beneficiary of the survivor annuity in a case such as this.

(rejecting a federal common law rule requiring the plan administrator to defer to a claimant's treating physician on medical issues in connection with a claim for benefits because such a rule "lack[ed] Department of Labor endorsement"). As respondents note, the Secretary of the Treasury has issued regulations addressing the timing and content of an election to waive QJSA benefits. See Br. in Opp. 12-13 (discussing 26 C.F.R. 1.401(a)-20, Q&A-10(a), Q&A-25(b)(3)). Those regulations reflect the Secretary's view that ERISA does not require a pension plan to recognize a waiver and change in beneficiary after a participant starts receiving benefits under a QJSA.

The regulations provide that the annuity starting date, defined as "the first day of the first period for which an amount is paid as an annuity or any other form," 26 C.F.R. 1.401(a)-20, Q&A-10(b)(1), is used "to determine when a spouse may consent to and a participant may waive a QJSA." 26 C.F.R. 1.401(a)-20, Q&A-10(a). A waiver is effective only if it is made within 90 days before the annuity starting date. *Ibid.*[9] The regulations then specify that changes in marital status that occur after the plan begins payment of the annuity do not change the pre-retirement designation:

> If a participant dies after the annuity starting date, the spouse to whom the participant was married on the annuity starting date is entitled to the QJSA protection under the plan. The spouse is entitled to this protection (unless waived and consented to by such spouse) even if the participant and spouse are not married on the date

[9] If the plan provides the written explanation required by 29 U.S.C. 1055(c)(3)(A) after the annuity starting date, the election period may extend beyond that date. 29 U.S.C. 1055(c)(8); 26 C.F.R. 1.417(e)-1(b)(3)(iv). Petitioner does not claim entitlement to such an extended election period.

> of the participant's death, except as provided in a QDRO.

26 C.F.R. 1.401(a)-20, Q&A-25(b)(3).[10] In other words, after annuity payments begin upon the participant's retirement, the spouse to whom the participant was married when payments began is entitled to the QJSA protection even if the participant and spouse later divorce. The regulation also sets forth the circumstances under which the QJSA protection will not be provided to the spouse who was married to the participant on the annuity starting date. A federal common law rule of waiver augmenting these exceptions thus would be contrary to the Treasury Department regulations, as well as to ERISA itself.[11]

B. This Case Is Not A Suitable Vehicle For Resolving The Circuit Conflict Over Whether A Pension Plan Must Recognize A Beneficiary's Waiver Of Benefits

1. Outside the QJSA context presented here, the courts of appeals are divided on whether a beneficiary's waiver of

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[10] The parenthetical phrase "unless waived and consented to by such spouse" in the regulation refers to a waiver and consent given in accordance with the special QJSA requirements, including the one set forth in 26 C.F.R. 1.401(a)-20, Q&A-10(a), discussed in the text. The waiver and consent thus must occur within 90 days before the annuity starting date or in accordance with the retroactive annuity starting date provisions described in footnote 9, *supra*.

The reference to a QDRO in the IRS regulation necessarily contemplates that the domestic relations order satisfy ERISA's requirements for a QDRO, including that it either be entered prior to retirement or, if entered post-retirement, that the terms of the plan provide for a change at that time. See note 15, *infra*.

[11] The Pension Benefit Guaranty Corporation, which pays guaranteed benefits after an underfunded defined-benefit pension plan terminates, see 29 U.S.C. 1322, requires that "[o]nce payment of a benefit starts, the benefit form cannot be changed." 29 C.F.R. 4022.8(d).

rights to ERISA benefits should be given effect as a matter of federal common law. The Sixth Circuit does not permit such waivers to override designations made in accordance with plan requirements. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Pressley*, 82 F.3d 126, 130 (1996), cert. denied, 520 U.S. 1143 (1997); *McMillan* v. *Parrott*, 913 F.2d 310, 311-312 (6th Cir. 1990). The Fourth, Fifth, Seventh, and Eighth Circuits have recognized such waivers as a matter of federal common law. See, *e.g.*, *Estate of Altobelli* v. *IBM Corp.*, 77 F.3d 78, 80-81 (4th Cir. 1996); *Brandon* v. *Travelers Ins. Co.*, 18 F.3d 1321, 1326 (5th Cir. 1994), cert. denied, 513 U.S. 1081 (1995); *Fox Valley & Vicinity Constr. Workers Pension Fund* v. *Brown*, 897 F.2d 275, 278-280 (7th Cir.) (en banc), cert. denied, 498 U.S. 820 (1990); *Hill* v. *AT&T Corp.*, 125 F.3d 646, 648 (8th Cir. 1997). The highest courts in Nebraska, Texas, and New York have also recognized such waivers as a matter of federal common law. See *Strong* v. *Omaha Constr. Indus. Pension Plan*, 701 N.W.2d 320, 327-329 (Neb. 2005) (per curiam); *Keen* v. *Weaver*, 121 S.W.3d 721, 725-727 (Tex.), cert. denied, 540 U.S. 1047 (2003); *Silber* v. *Silber*, 786 N.E.2d 1263, 1268-1269 (N.Y.), cert. denied, 540 U.S. 817 (2003).[12]

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[12] Petitioner erroneously asserts (Pet. 6) that the Tenth Circuit recognized a waiver as a matter of federal common law in *Metropolitan Life Insurance Co.* v. *Hanslip*, 939 F.2d 904 (1991), and that the Second Circuit rejected such a recognition in *Krishna* v. *Colgate Palmolive Co.*, 7 F.3d 11 (1993). *Hanslip* held that ERISA preempted a state law automatically revoking a beneficiary designation upon divorce—the same conclusion this Court later reached in *Egelhoff*—and did not decide any question whether to recognize a federal common law waiver. See 939 F.2d at 906-907. *Krishna* held that New York law allowing a change of beneficiary by a will is preempted and would not be adopted as a matter of federal common law. 7 F.3d at 13-16. The court did not decide whether to recognize a federal common law of waiver based on some other source.

This Court's review may be necessary, in an appropriate case, to resolve that conflict. The issue is important to plan administrators, who need to know whether ERISA requires them to follow the plan's terms or whether some different rule may be imposed upon them based on federal common law when they are faced with two or more claimants to the same plan benefits. The issue is also important to persons claiming benefits because the benefits at issue are often a significant source of support for them.

Contrary to respondents' argument (Br. in Opp. 8-9), *Boggs* has not eliminated the conflict in the courts of appeals in favor of a rule prohibiting waivers under federal common law. Courts recognizing such waivers have continued to do so after *Boggs* and *Egelhoff*. See, *e.g.*, *Guardian Life Ins. Co. of Am.* v. *Finch*, 395 F.3d 238, 243 (5th Cir. 2004) ("*Egelhoff* does not undermine this court's longstanding approach of relying on federal common law" to give effect to the designated beneficiary's waiver of her rights to a life insurance policy.), cert. denied, 125 S. Ct. 2305 (2005); *Manning* v. *Hayes*, 212 F.3d 866, 873-874 (5th Cir. 2000) ("[t]he principles at work in *Boggs* are clearly inapplicable" to "disputes between a non-beneficiary claimant and the named ERISA beneficiary to life insurance proceeds"), cert. denied, 532 U.S. 941 (2001); *Melton* v. *Melton*, 324 F.3d 941, 945 (7th Cir. 2003) (adhering after *Egelhoff* to circuit precedent providing that designated beneficiary may waive interest in ERISA-regulated plan); *Strong*, 701 N.W.2d at 329 (not persuaded that *Egelhoff* undermines the waiver rule); *Keen*, 121 S.W.3d at 726 (reading *Egelhoff* to *support* use of federal common law); *Silber*, 786 N.E.2d at

1268-1269 (rejecting contention that *Egelhoff* precludes application of federal common law to recognize a waiver).[13]

2. This case, however, is not an appropriate vehicle for the Court to decide whether the terms of a plan or a rule developed as a matter of federal common law applies to a purported waiver of pension rights. That is because this case involves an attempt by a plan participant to change the surviving spouse in a QJSA *after* he retired and started to receive annuity payments. That circumstance is addressed with particular specificity in the relevant statutory and reg-

[13] Those courts that have declined to give effect to a waiver as a matter of federal common law have not ruled out reliance on federal common law to determine the identity of a beneficiary in certain unique circumstances. Cf. *Egelhoff*, 532 U.S. at 152 (not deciding whether a "slayer" statute could revoke the beneficiary status of someone who murdered a plan participant, see note 6, *supra*). For example, the Sixth Circuit has fashioned principles of federal common law to determine whether the designation of a beneficiary in plan documents was the result of fraud or forgery. *Tinsley* v. *General Motors Corp.*, 227 F.3d 700, 704-706 (6th Cir. 2000). That court also permits imposition of a constructive trust on life insurance benefits when an individual has received them pursuant to plan terms but in violation of a non-ERISA-qualified state court domestic relations order. See *Central States, S.E. & S.W. Areas Pension Fund* v. *Howell*, 227 F.3d 672, 678-679 (6th Cir. 2000). The Third Circuit's decision in this case also leaves open the possibility of developing principles of federal common law to determine entitlement to the proceeds of a life insurance policy. That is because life insurance is a welfare benefit, see 29 U.S.C. 1002(1) (defining "employee welfare benefit plan"), and the Third Circuit here rejected reliance on a federal common law rule of waiver as inconsistent with ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1). See Pet. App. 13a-17a; *id.* at 19a-20a (Becker, J. concurring). But that provision, even if it applies to limit or prevent the transfer of pension benefits (itself a difficult issue on which the United States has not reached a concluded view), would not apply to welfare benefits, such as life insurance, because it applies to pension plans but not to welfare plans. *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836-837 (1988).

ulatory provisions, and so it does not squarely implicate the broader conflict concerning waivers in other contexts. No court of appeals has required a plan administrator to recognize a waiver in this situation, and there are good reasons to believe that courts requiring recognition of waivers as a matter of federal common law in other circumstances would not do so here.

In particular, courts that have recognized waivers have done so in cases in which the participant died *before* receiving benefits. See, *e.g.*, *Finch*, 395 F.3d at 239; *Altobelli*, 77 F.3d at 79; *Brandon*, 18 F.3d at 1322; *Fox Valley*, 897 F.2d at 277; *Strong*, 701 N.W.2d at 323-324; *Keen*, 121 S.W.3d at 722; *Silber*, 786 N.E.2d at 1265-1266. In those circumstances, the amount of benefits was not at issue; instead the issue was which of two claimants, usually a former spouse on the one hand and the current spouse or decedent's estate on the other, would receive them. Although those cases resulted in litigation costs for the plan and delays in distributing benefits, they did not require the plan to pay benefits different from what the plan provided.

In this case, by contrast, petitioner seeks to require the plan to pay benefits not contemplated by the plan. The QJSA form of benefits provides an annuity to the participant based on the joint life of the participant and his or her spouse, and a surviving spouse annuity. 29 U.S.C. 1055(d). Accordingly, "the plan administrator must know the life expectancy of the person receiving the Surviving Spouse Benefits to determine the participant's monthly Pension Benefits." *Hopkins* v. *AT&T Global Info. Solutions Co.*, 105 F.3d 153, 157 n.7 (4th Cir. 1997). Changing the survivor after retirement, as petitioner seeks to do here, would require a plan either to recalculate the participant's payments based on the new surviving spouse's life expectancy, or to pay benefits it had not agreed to pay by continuing the ex-

isting payments even though the actuarial basis for them has likely changed. Under the latter alternative, the age or health status of the new spouse, as compared with that of the former spouse, may create the possibility of manipulation at the expense of the plan by permitting the participant to (1) provide greater lifetime pension benefits to the new spouse (if she has a longer life expectancy) than the former spouse would have received, and then (2) compensate the former spouse in some other way for her loss of plan benefits.

Accordingly, two courts of appeals that have invoked federal common law to recognize a waiver *pre*-retirement have refused to permit *post*-retirement changes to the designation of the surviving spouse in a QJSA. See *Hopkins*, 105 F.3d at 157 ("[A]fter retirement, a participant cannot change the distribution of plan benefits [under a QJSA], even with the current spouse's approval."); *Rivers* v. *Central & S.W. Corp.*, 186 F.3d 681, 683 (5th Cir. 1999) ("This Circuit agrees with the Fourth Circuit's decision in *Hopkins* and adopts its rationale.").[14] The Eleventh Circuit also recognizes that under a QJSA governed by 29 U.S.C. 1055 (2000 & Supp. III 2003), "survivor annuity benefits are only available to a spouse who was married to the participant when the annuity payments began." *Holloman* v. *Mail-Well Corp.*, 443 F.3d 832, 841 (2006). Those decisions, and the absence of contrary authority from any other court of appeals, strongly suggest that no court of appeals would require the plan to recognize the waiver at issue here. See *Anderson* v. *Marshall*, 856 F. Supp. 604, 606-607 (D. Kan.

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[14] These decisions involve a situation, like that here, where the annuity starting date is fixed and no provision is made under the plan for a new starting date. Cf. note 7, *supra* (discussing the possibility that, consistent with ERISA, a plan could choose in certain circumstances to provide a new annuity starting date).

1994) (federal common law rule of waiver does not apply where "the defendant has retired and is not free to change his beneficiary designation").[15] The fact that the statute and regulations address the post-retirement situation with greater specificity weakens the basis for any court to fashion a federal common law rule in the post-retirement context, no matter what it may adopt for the pre-retirement context. This case therefore is not an appropriate vehicle for resolving the conflict among the courts of appeals and state courts on whether a rule fashioned as a matter of federal common law requires a plan administrator to recognize a waiver of rights to benefits under other circumstances, even in the absence of a provision in ERISA or the plan allowing such a waiver.

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[15] A separate issue, not presented here, is whether a QDRO can alter the surviving spouse designation in a QJSA after a participant retires. See *Torres* v. *Torres*, 60 P.3d 798, 820-822 (Haw. 2002) (holding, contrary to *Hopkins* and *Rivers*, that QJSA benefits do not vest on retirement). The court below suggested that petitioner could have obtained a QDRO after his retirement and divorce, despite the fact that the plan would not have permitted a change in the survivor designation at that time. See Pet. App. 17a (petitioner "has provided no reason why he could not have obtained a QDRO * * * at the time of the divorce"). That suggestion is mistaken because it conflicts with 29 U.S.C. 1056(d)(3)(D)(i), which prohibits a QDRO from requiring "a plan to provide any type or *form of benefit*, or *any option*, not otherwise provided under the plan." In any event, because petitioner has not relied on the QDRO provisions, see Pet. App. 10a n.3, 49a n.5, this case does not present the question whether a QDRO can alter the surviving spouse designation in a QJSA after a participant retires and annuity payments have commenced, where the plan does not so provide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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